A

Amaravathy d/o V Nadeson & Anor (both as administratixes of the estate of Ayaduray Sugirtha Lingam, deceased) v Sivapragasam s/o Nagamany (as executor of the estate of K Nagamany Nee Sugirtha Letchumy d/o Ayadurai)

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A–02–612 OF 2001
DENIS ONG, ABDUL AZIZ MOHAMAD AND JAMES FOONG JJCA
4 MAY 2007

C

Succession — Administration — Sale of land — Transfer of property by administrator — Whether leave of court required where court ordered specific performance of contract — Probate and Administration Act 1959 s 60(4)

D

Moorthy was the registered owner of some land in Canning Garden, Ipoh ('the property') in which the beneficial interest was held by his brother, Lingam. Moorthy and Lingam had a sister, who was married to one Nagamany. The plaintiff claimed that, sometime in 1960, Nagamany purchased the property from Moorthy and Lingam, the legal owner and the beneficial owners respectively, for RM18,500, The brothers agreed upon an undertaking to transfer the property to their sister, Mrs Nagamany. Moorthy died in 1966 and the property was transferred to Lingam, on the understanding that it would later be transferred to Mrs Nagamany. Nagamany and Lingam died in 1973 but the property remained in Lingam's name. Pursuant to a further 'verbal agreement and undertaking' made with Mrs Lingam, Mrs Nagamany surrendered Lingam's IOU note and transferred another property to Mrs Lingam on an undertaking by Mrs Lingam to have the property transferred to Mrs Nagamany when the letters of administration had been extracted and the necessary orders obtained. Despite repeated requests made by Mrs Nagamany and repeated assurances given by Mrs Lingam, the property was not transferred to Mrs Nagamany. In September 1974 Mrs Lingam purported to give Mrs Nagamany an option to purchase the property for RM40,000. Later Mrs Lingam's solicitors sent Mrs Nagamany a draft agreement for Mrs Nagamany's perusal and approval but the agreement was never executed because Mrs Lingam had changed her mind. Mrs Lingam and her daughter were granted letters of administration to Lingam's estate in 1975. Mrs Lingam imposed a monthly rental of RM100, which Mrs Nagamany paid, out of fear of being evicted, until November 1979 when Mrs Lingam gave Mrs Nagamany notice to quit. Mrs Nagamany then refused to pay rental. Mrs Nagamany brought the present action in 1980 seeking, inter alia, specific performance of the said 'agreement' and a refund of all moneys paid as rental. Mrs Nagamany died in 1986. The trial judge found that the oral agreement of 1973 between Mrs Lingam and Mrs Nagamany was a concluded contract. He ordered specific performance of the oral agreement and a refund of all rentals paid. Mrs Lingam and her daughter as administratrices of Lingam's estate appealed. They argued, relying on *Chor Phaik Har*, that at the date of the purported oral agreement in March 1973 and of the draft agreement in October 1974, neither

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Mrs Lingam nor her daughter, the persons named in the draft agreement as the first party, had any capacity to transfer the property, and thus no property to transfer. They had, at that point in time, yet to be appointed administratrices of Lingam's estate. They further contended that the order for specific performance ought to contain a requirement for leave of the court be obtained pursuant to s 60(4) of the Probate and Administration Act 1959 which requires that an administrator not transfer any immovable property vested in him without the prior permission of the court.

Held, dismissing the appeal:

(1) The decision in *Chor Phaik Har* states that the beneficiary of the estate of a person who dies intestate has no title to any property forming part of the estate until it actually becomes his, upon the due administration and distribution of the estate, and he cannot dispose the property. He cannot dispose what is not yet his. Here, by contrast, Mrs Lingam was not agreeing to transfer property she expected to obtain as a beneficiary of her husband's estate. Her late husband had already sold the property and been fully paid for it. The property was no longer a part of the estate and his beneficiaries could have no share in it. She had agreed and undertaken to honour the sale. She had agreed to transfer the property when she obtained letters of administration. Mrs Lingam's promise was a promise to discharge an existing obligation of the estate when she had the capacity to do so. Now that she was clothed with that capacity, she was bound to carry out the promise (see paras 11–12); *Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188 distinguished.

(2) Section 60(4) does not apply to a case where, as here, the transfer is to be carried out on an order of the court. It would be absurd for this court to order the appellants to effect a transfer of the property to the respondents and, at the same time, require them to obtain the permission of the court before doing so. The point is not such as would strike at the validity of the finding of a concluded or binding contract nor the validity of the orders for specific performance. According to s 60(6) the consequence of a contravention of s 60(4) is on the transfer, and that, too, only to render it voidable at the instance of any other person interested in the property (see para 13).

[Bahasa Malaysia summary

Moorthy adalah pemilik berdaftar beberapa bidang tanah di Canning Garden, Ipoh ('hartanah tersebut') yang mana kepentingan benefisiari dipegang oleh adik lelakinya. Moorthy dan Lingam mempunyai seorang adik perempuan, yang telah berkahwin dengan Nagamany. Plaintif mendakwa bahawa, sekitar tahun 1960, Nagamany telah membeli hartanah tersebut daripada Moorthy dan Lingam, masing-masingnya pemilik sah dan pemilik benefisiari, untuk RM18,500. Adik-beradik lelaki itu bersetuju satu akujanji untuk pindah milik dibuat kepada adik perempuan mereka, Puan Nagamany. Moorthy telah meninggal dunia dalam tahun 1973 tetapi hartanah tersebut kekal dalam nama Lingam. Menurut satu 'verbal agreement and undertaking' lain yang dibuat dengan Puan Lingam, Puan Nagamany telah

menyerahkan bil 'IOU' Lingam dan memindah milik hartanah tersebut kepada Puan Lingam atas satu akujanji oleh Puan Lingam agar hartanah tersebut dipindah milik kepada Puan Nagamany dan jaminan Puan Lingam yang beberapa kali telah diulangi, hartanah tersebut tidak juga dipindah milik kepada Puan Nagamany. Pada bulan September 1974 Puan Lingam dikatakan telah memberikan Puan Nagamany pilihan untuk membeli hartanah tersebut untuk RM40,000. Kemudian peguam Puan Lingam telah menghantar satu draf perjanjian kepada Puan Nagamany untuk penelitian dan kelulusannya tetapi perjanjian itu tidak disempurnakan kerana Puan Lingam telah berubah fikiran. Puan Lingam dan anak perempuannya telah diberikan surat pentadbiran ke atas harta pusaka Lingam pada tahun 1975. Puan Lingam telah mengenakan sewa bulanan berjumlah RM100, yang dibayar oleh Puan Nagamany kerana takut akan dihalau, sehingga November 1979 apabila Puan Lingam memberikan Puan Nagamany notice untuk berpindah. Puan Nagamany kemudian enggan membayar sewa. Puan Nagamany telah memulakan tindakan ini pada tahun 1980 memohon, antara lain, pelaksanaan spesifik 'perjanjian' tersebut dan pulangan semula semua wang telah dibayar untuk sewa. Puan Nagamany telah meninggal dunia pada tahun 1986. Hakim perbicaraan memutuskan bahawa perjanjian lisan 1973 antara Puan Lingam dan Puan Nagamany adalah satu kontrak yang mengikat. Beliau memerintahkan pelaksanaan spesifik perjanjian lisan itu dan pengembalian semula semua sewa yang telah dibayar. Puan Lingam dan anak perempuannya sebagai pentadbir-pentadbir harta pusaka Lingam merayu. Mereka berhujah, bergantung kepada *Chor Phaik Har*, bahawa pada tarikh perjanjian lisan yang dikatakan dalam bulan Mac 1973 dan draf perjanjian dalam bulan Oktober 1974, Puan Lingam maupun anak perempuannya, penama dalam draf perjanjian itu sebagai pihak pertama, tidak mempunyai apa-apa kapasiti untuk memindah milik hartanah tersebut, dan oleh itu tiada hartanah untuk dipindah milik. Mereka telah, pada masa itu, belum dilantik sebagai pentadbir-pentadbir harta pusaka Lingam. Mereka seterusnya berhujah bahawa perintah untuk pelaksanaan spesifik patut mempunyai keperluan untuk kebenaran mahkamah diperoleh menurut s 60(4) Akta Probat dan Pentadbiran 1959 yang menghendaki seorang pentadbir tidak memindah milik apa-apa hartanah yang tak boleh ali yang diberikan kepadanya tanpa terlebih dahulu mendapatkan kebenaran mahkamah.

Diputuskan, menolak rayuan tersebut:

(1) Keputusan dalam *Chor Phaik Har* menyatakan bahawa benefisiari harta pusaka orang yang meninggal dunia tanpa wasiat tiada hak milik ke atas mana-mana hartanah yang membentuk sebahagian daripada harta pusaka itu sehingga ia dengan sah menjadi miliknya, setelah pentadbiran dan pengagihan harta pusakan dilaksanakan, dan beliau tidak boleh menjual hartanah tersebut. Beliau tidak menjual apa yang belum miliknya. Di sini, sebaliknya, Puan Lingam tidak bersetuju dengan pindah milik hartanah yang beliau harap akan peroleh sebagai benefisiari kepada harta pusaka suaminya. Mendiang suaminya telahpun menjual hartanah itu dan telahpun dibayar penuh untuknya. Hartanah tersebut bukan lagi merupakan sebahagian daripada harta pusaka dan benefisiarinya tiada bahagian dalamnya. Beliau bersetuju dan akur denga jualan itu. Beliau bersetuju untuk memindah milik

hartanah tersebut apabila mendapat surat-surat pentadbiran. Janji Puan Lingam merupakan jani untuk melepaskan tanggungjawab sedia ada ke atas harta pusaka itu apabila beliau mempunyai kapasiti untuk berbuat sedemikian, Sekarang beliau mendapat kapasiti tersebut, beliau terikat untuk melaksanakan janji itu (lihat perenggan 11–12); *Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188 dibeza.

(2) Seksyen 60(4) tidak terpakai dalam kes di mana, seperti di sini, pindah milik akan dilaksanakan berdasarkan satu perintah mahkamah. Adalah melampau untuk mahkamah ini memerintahkan perayu-perayu untuk melaksanakan pindah milik hartanah tersebut kepada responde-responden dan, pada masa yang sama, menghendaki mereka mendapatkan kebenaran mahkamah sebelum berbuat demikian. Perkara ini bukan begitu sehingga menjejas kesahan penemuan satu kontrak yang mengikat maupun kesahan perintah-perintah untuk pelaksanaan spesifik. Menurut s 60(6) akibat daripada percanggahan s 60(4) adalah ke atas pindah milik itu, dan itu juga, hanya untuk menjadikannya boleh batal oleh sesiapa lain yang berkepentingan dalam hartanah tersebut (lihat perenggan 13).]

Notes

For cases on sale of land under succession, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paars 2022–2048.

Cases referred to

Chor Phaik Har v Farlim Properties Sdn Bhd [1997] 3 MLJ 188 (distd)

Legislation referred to

Probate and Administration Act 1959 s 60(4), (6)

Appeal from: Civil Suit No 243 of 1980 (High Court, Ipoh)

Datuk N Chandran (Sri Dev Nair with him) (Sri Dev & Naila) for the appellants.
RD Rajasingam (B Muralidharan with him) (Lewis & Co) for the respondent.

Abdul Aziz Mohamad JCA (now FCJ, delivering judgment of the court):

[1] This appeal, which we dismissed, arose from a dispute between the estate of K Nagamany nee Sugirtha Letchumy d/o Ayadurai, deceased ('Mrs Nagamany') and the estate of Ayaduray Sugirtha Lingam, deceased ('Mr Lingam'), who was Mrs Nagamany's twin brother. Mrs Nagamany's estate was represented by its executor, Mrs Nagamany's son, as the plaintiff in the High Court and the respondent in the appeal. Mr Lingam's estate was represented by its two administratrices, Mr Lingam's widow and their daughter, as defendants in the High Court and appellants in the appeal. Mr Lingam's widow, Amaravathy d/o Nadeson, will now be referred to as 'Mrs Lingam'. The dispute was over a parcel of land with a house on it known as No 10, Woods Avenue, Canning Garden, Ipoh ('the property'). Although

originally its registered owner was Mrs Nagamany's elder brother Ganesa Moorthy ('Mr Moorthy'), its beneficial owner was Mr Lingam, Mrs Nagamany's twin brother.

[2] In his amended statement of claim, the plaintiff (representing the estate of Mrs Nagamany) averred, inter alia, as follows. In 1960 Mr Nagamany, Mrs Nagamany's husband, purchased the property from Mr Moorthy, the legal owner, and Mr Lingam, the beneficial owner, for RM18,500, which sum, on the instructions and with the full knowledge of Mr Lingam, Mr Nagamany tendered in full to Mr Moorthy. The property, however, continued to be in Mr Moorthy's name although Mr Moorthy and Mr Lingam agreed and undertook to transfer the property to Mrs Nagamany. After Mr Moorthy died on 17 July 1966, Mr Lingam had the property transferred into his name on the understanding that it would later be transferred to Mrs Nagamany. Mr Nagamany died on 2 February 1973 and Mr Lingam on 1 March 1973, but the property had not been transferred to Mrs Nagamany.

[3] The amended statement of claim went on to aver, inter alia, as follows. On 17 March 1973, about two weeks after Mr Lingam died, when Mrs Nagamany went and saw Mrs Lingam at her house in Taiping, the latter 'orally agreed' to transfer the property to Mrs Nagamany as soon as letters of administration to Mr Lingam's estate had been extracted and the necessary orders obtained. This was averred in para 8. Paragraphs 9 and 10 contained averments that Mrs Lingam prevailed upon Mrs Nagamany to surrender to Mrs Lingam Mr Lingam's I.O.U. chit for a sum of RM10,000 owed by Mr Lingam to Mr Nagamany and to transfer to Mrs Lingam Mrs Nagamany's Lot 34406. In para 10 it was averred that Mrs Lingam again 'verbally agreed and undertook' to transfer the property to Mrs Nagamany. In paragraph 11 it was averred that on 16 February 1974, when they were in the office of Mrs Lingam's solicitors to effect the transfer of Mrs Nagamany's Lot 34406 to Mrs Lingam, the latter intimated to Mrs Nagamany that she would honour her 'verbal agreement and undertaking' in respect of the property. In para 12 it was averred that to show her sincerity in wanting to complete her part of the agreement Mrs Lingam instructed her solicitors to prepare an agreement to transfer the property to Mrs Nagamany for love and affection and that Mrs Nagamany's transfer of her Lot 34406 was 'in reliance on the aforesaid representation', which might be intended to refer to Mrs Lingam's intimation to Mrs Nagamany that was averred in para 11.

[4] The amended statement of claim continued to aver that although Mrs Lingam continued to make known to Mrs Nagamany that she was ready and willing to transfer the property to Mrs Nagamany, by letter dated 13 September 1974 Mrs Lingam withdrew her undertaking to transfer the property and instead gave Mrs Nagamany an option to purchase it for RM40,000. In October 1974 Mrs Lingam's solicitors sent to Mrs Nagamany a draft agreement for the transfer of the property to her for her perusal and approval but the agreement was never executed owing to Mrs Lingam's change of mind. Mrs Lingam imposed on Mrs Nagamany a rental of RM100 per month for occupying the property, which Mrs Nagamany paid out of fear of being evicted. On 28 November 1979 Mrs Lingam gave Mrs Nagamany three months' notice to quit, and since then Mrs Nagamany had refused to pay the rental.

[5] The plaintiff sought various reliefs, the foremost being — prayer (a) — specific performance of 'the said agreement'. That phrase, which had not been used previously in the amended statement of claim, could only refer to the oral agreement averred in paragraph 8 by which, on 17 March 1973, Mrs Lingam orally agreed to transfer the property into Mrs Nagamany's name as soon as the letters of administration had been extracted and the necessary orders obtained. Of the other reliefs sought was a refund of all moneys paid as rental.

[6] Mrs Lingam and daughter were granted letters of administration to the estate of Mr Lingam on 5 November 1975. Mrs Nagamany, who originally in July 1980 brought the action, died on 20 June 1986.

[7] The learned trial judge, after considering the evidence adduced in the trial on both sides, ordered specific performance of the oral agreement of 17 March 1973 between Mrs Lingam and Mrs Nagamany and also ordered a refund of all rentals that Mrs Nagamany had paid for occupying the property. He found that the oral agreement of 17 March 1973 was a concluded contract. He was fortified in that finding by the fact that subsequently a draft agreement was prepared by Mrs Lingam's solicitors, which he said was the most salient aspect of the case. He concluded by finding on the strength of the draft agreement 'of 16 October 1974' and on the totality of the evidence that the plaintiff had established on a balance of probabilities a case for specific performance.

[8] For the appeal before us, which was that of Mrs Lingam and her daughter as administratrices of the estate of Mr Lingam, a written submission had been prepared by their counsel where the only point argued was that the learned trial judge arrived at his decision without sufficient judicial evaluation and appreciation of the entire evidence. This argument was not pursued in counsel's oral submission because, by consent, leave was granted for the appellants to raise two points not argued in the High Court, and those were the points that were pursued in oral submission before us. The more important of the two points was that at the date of the oral agreement of 17 March 1973 and of the draft agreement of October 1974 Mrs Lingam and her daughter, who were named in the draft agreement as the first party, had no capacity to transfer the property, and no property to transfer, because they had not yet been appointed administratrices of the estate of Mr Lingam. They were granted letters of administration only on 5 November 1975.

[9] In connection with this point as to capacity, a criticism was made of the learned trial judge's referring to the draft agreement as one 'of 16th October 1974', that it was not clear where he got the date. Nothing, however, turned on this. If it was a mistake it was immaterial. The fact was that the draft agreement gave October 1974 as the date, the actual day being left blank.

[10] It is important to bear in mind that the agreement that the plaintiff sought, and the judge granted, specific performance of was the oral agreement of 17 March 1973, not the draft agreement of October 1974. The learned judge merely took the evidence of the draft agreement as proof of the existence of a concluded contract by

A the oral agreement of 17 March 1973. Therefore the point as to capacity needed only to be considered in relation to the oral agreement of 17 March 1973.

[11] In support of the argument as to capacity, the appellants' counsel relied on *Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188. In that case the B question that arose was whether the beneficiaries of the estate of a person who had died intestate could in law, before the estate of the deceased was administered and distributed, have any interest or property in the estate. The Federal Court said at p 196:

C > … it is our conclusion that in law a beneficiary under an intestacy has no interest or property in the personal estate of a deceased person until the administration of the latter's estate is complete and distribution made according to the law of distribution of the intestate estate.

Therefore the beneficiaries had no title to lands belonging to the estate and could not enter, as they did, into agreements to sell the lands. What the decision amounts to D is that a beneficiary of the estate of a person who died intestate has no title to any property forming, or forming part of, the estate until it actually becomes his after and as a result of the administration and distribution of the estate, and cannot dispose of the property. He cannot dispose of what is not yet his.

E **[12]** That was the only case relied on by the appellants to argue in the appeal against the finding of the learned trial judge that the oral agreement of 17 March 1973 was a binding agreement. That case clearly is inapplicable to the present case, because the present case is not a case where a beneficiary of an intestate estate was attempting to dispose of his expected share in the estate. Mrs Lingam, when she F verbally agreed and undertook on 17 March 1973 to transfer the property to Mrs Nagamany as soon as she obtained letters of administration to the estate of her husband, was not agreeing to transfer it as a property that she expected to obtain as a beneficiary of her husband's estate, but as a property that her husband had already sold to Mr Nagamany and been fully paid for. It was to honour the sale and the understanding that the property would be transferred to Mrs Nagamany. G Mrs Lingam made the promise on behalf of Mr Lingam's estate which already owed the property to Mrs Lingam, and not on behalf of herself as a beneficiary of the property. The property having been sold by Mr Lingam, it was no longer a part of Mr Lingam's estate and his beneficiaries could have no share in it. Mrs Lingam's promise was a promise to discharge an existing obligation of Mr Lingam's estate when H she had the capacity to do so. Now that she was clothed with that capacity by being appointed administratrix, she, along with her daughter, was bound to carry out the promise.

[13] The appellants' other point was that the order for specific performance should I have contained a requirement that the permission of the court be obtained under s 60(4) of the Probate and Administration Act 1959 for the transfer of the property to the plaintiff. That section provides, inter alia, that an administrator may not, without the previous permission of the court, transfer any immovable property for the time being vested in him. We were of the view that s 60(4) does not apply to a case, as this case was, where the transfer would be carried out on the order of the

court itself. It would have been absurd for the court to order the appellants to effect a transfer of the property and at the same time to order them not to do so before obtaining the permission of the court. In any case the point was not of a nature that would strike at the validity of the finding of a concluded or binding contract or of the validity of the orders for specific performance made in consequence of the finding, because, according to s 60(6) the consequence of contravention of s 60(4) is on the transfer, and that, too, only to render it voidable at the instance of any other person interested in the property.

[14] As the appellants failed on both points, their appeal was dismissed with costs, the orders of the High Court were affirmed, and the deposit was ordered to be paid to the respondent to account of taxed costs to be paid out of the estate of Ayaduray Sugirtha Lingam (deceased).

Appeal dismissed.

Reported by Sivapragasam Kumaran